

DEQ – Air Quality Division
SUMMARY OF NEGOTIATED RULEMAKING
DAIRY PERMITTING RULEMAKING
DOCKET No. 58-0101-0502
June 29, 2005

PARTICIPANTS

Bauer, Martin – DEQ
Brown, Cashia – Elmore County
Cline, Debra – (recorder) DEQ
Haynes, Claudia - Canyon County
Kronberg, Lisa – Attorney General's Office
Louks, Bruce – DEQ
McClure, Ken – Givens Pursley
McLean, Lauren – Idaho Conservation League
Naerebout, Bob – Idaho Dairyman's Assoc.
Olmstead, Brent – Milk Producers of Idaho
Parks, Ron – J. R. Simplot Co.
Patten, Marv – ISDA
Quesnell, Mike - Idaho Dairyman's Assoc.
Sheffield, Ron – Biological & Agricultural Engineering, University of Idaho

DRAFT RULE AND RULE STRUCTURE

Lisa Kronberg, Deputy Attorney General, reviewed the changes made to the draft rule at the last meeting (see attached).

After discussion, the group agreed language should be added to the preamble of the rule to supply additional explanation for the chart in Section 761. A reference will also be added to the rule to indicate where additional information can be found on the Web site and in other documents such as the fact sheet and the BMPs. The word "other" will be dropped from subscript 1 of Section 761 to read, "drop-hose or ~~other~~ ground level liquid manure application."

Lauren McLean, Idaho Conservation League (ICL), pointed out that language should be added to state clearly that no dairy will operate without a permit. Lisa Kronberg will re-insert the language. It was inadvertently deleted from a previous draft. Future drafts will be dated.

Section 763 and record keeping requirements were discussed. Based on discussions at the last meeting, it was agreed that an initial qualifying inspection would be done, similar to the process used for nutrient management plans. The inspection form will show what BMPs are being used to meet the required points and will provide the "plan" for meeting requirements. Record keeping requirements for modifications or changes to the initial form were discussed. The group agreed changes would be handled through subsequent inspections – no formal notice process would be required. The most recent

inspection form will serve as the revised plan and will supply the updated information showing how the required points are being acquired.

Lisa Kronberg discussed the language change in Section 763.01 Registration Process. Any owner or operator of a new dairy farm shall register within fifteen (15) days of commencing ~~construction~~ operation. The group agreed to two additional changes. Martin Bauer noted a definition should be added to clarify “commencing operation.” A change was also made to the wording to read, “(15) days ~~of~~ prior to commencing operation.”

Martin Bauer said DEQ will provide training on the rules and how the forms should be completed. Additional one-on-one training may be provided by the dairy industry.

Lauren McLean stressed the qualifying inspection should be scheduled in a reasonable amount of time, not several months later on the regular inspection date. Marv Patten, ISDA, was confident the qualifying inspection could be done within 30 days of registration. Lisa Kronberg was very concerned about tying ISDA to a 30-day time frame for the inspection. Mr. Patten felt once the initial registrations are done for the 35 dairies, it should be no problem to meet the deadline.

Martin Bauer pointed out the need for clarification between the registration process and the application process. The ISDA appears to have a slightly different definition for registration than DEQ. He felt the dairies should register within 15 days of commencing operation, then file an application for a permit by rule that describes what BMPs will be used, within 15 days after registration (for a total of 30 days). Ms. Kronberg will add wording in Section 763.04 to state that a qualifying inspection will be done within 30 days of receipt of information.

Ken McClure questioned the need for the information requested in Section 763.03.b regarding the size and type of dairy farm. He felt the information was unnecessary and would only cause confusion for dairies who wanted to voluntarily take part in the program. He also felt the rules needed further clarification regarding voluntary participation. Martin Bauer stated a dairy who voluntarily obtained a permit by rule could also choose to leave the program, but not during an enforcement action. Mr. McClure stated the process for opting out should be clearly spelled out in the rule or the fact sheet.

Lauren McLean felt it was very important to have the information requested in Section 763.03.b. The information is needed to show the dairy is subject to the rules and would help prioritize the need for inspections between dairies who are subject to the rules and those who take part voluntarily. It is also more convenient.

Martin Bauer commented the information requested in Section 763.03.b. would be available in several other places and probably was not necessary. Ken McClure asserted that if the section did not serve a regulatory purpose, it should be deleted. There was a lengthy discussion and debate on whether Section 763.03.b should be

retained in the rules. The group was unable to reach consensus, and the matter was set aside.

Marv Patten pointed out that clarifying language should be added to Section 763.02 to state that a dairy farm shall register within 15 days if it expands its size or makes modifications to its operation that bring it above the threshold. Lisa Kronberg will add appropriate language.

Ken McClure asked if dairies would be notified that they were in compliance after the qualifying inspection. Marv Patten stated the inspection form would clearly state whether the dairy was in compliance and the dairymen would keep the original copy of the inspection form.

Lisa Kronberg noted that Section 764 had been revised to delete the record keeping requirement in lieu of the qualifying inspection. A reference was added for the Manual of BMPs where new, Director approved BMPs could be listed.

Lauren McLean asked if there was clear legal authority to perform inspections or if language needed to be added to the rules. Marv Patten noted it was not clear whether Idaho Code § 39-118 provides adequate authority. It could be interpreted to apply specifically to plan and specification review and may not apply to the qualifying inspection. Lisa Kronberg stated the rule was based on Idaho Code § 39-108 which gives DEQ the general authority to take enforcement action, to inspect, or delegate to another to inspect. She will investigate the Dairy Waste Management Rule, IDAPA 02.04.14, and the ISDA memorandum of understanding (MOU) with EPA to find appropriate language to be added to the rule (perhaps at Section 765).

Ken McClure suggested DEQ seek an Attorney General's opinion on the issue. He believed under the Intergovernmental Cooperation Act (also referred to as the Joint Powers Act), it is relatively clear that an enforcement action could be delegated by DEQ to ISDA through an MOU. Lisa Kronberg will discuss the matter with the Attorney General's office.

Ken McClure stated his concern that the dairymen could get "whip sawed" between the two agencies. He stressed the enforcement and inspection authority should be vested in the same place. He wanted ISDA to be able to issue a notice of violation under Idaho Code § 39-108(3)(a) and to issue orders compelling compliance under the requirements of Section 760 – 764. He also suggested Section 764.01 be revised to read, "Each dairy farm subject to Section 760 through 764 of these rules shall employ BMPs . . ."

Lisa Kronberg noted that in order for ISDA to issue compliance orders, Idaho Code § 39-116 and 116(a) which provide authority to issue compliance schedules and compliance agreement schedules, would also have to be delegated to ISDA. Marv Patten observed it might be cleaner to establish authority through legislation. Lauren McLean strongly objected to moving enforcement actions to ISDA. Previous discussions stated that inspections would be delegated to ISDA, and everything would

come back to DEQ. Martin Bauer assured the matter was being discussed only in terms of legal authority. No such action would take place or be presented for decision of the group before being fully reviewed with the Director.

Lisa Kronberg assured she had no vested interest in which agency handled the enforcement, her job is simply to ensure it is handled in a legally correct manner. She emphasized the Deputy Attorneys General are neutral and only consider legal issues.

Lauren McLean asked that before any language is included in the draft rules, or any further discussions regarding delegating enforcement authority take place in the rulemaking meeting, separate discussions be held to consider the matter. She felt it was inappropriate to have any discussion of possible legislation at this point. Martin Bauer stated it might be appropriate to have all the attorneys meet to discuss the matter after the legal research is completed. At this point, the DEQ legal counsel has indicated DEQ has the authority to delegate inspections, but not enforcement. If further legal research indicates DEQ can delegate enforcement, the matter will be taken to Director Hardesty for discussion.

Marv Patten noted initial discussions indicated ISDA has authority under Idaho Code § 37-401 to promulgate a similar rule. This might be an option to consider to find the cleanest, simplest process. Martin Bauer pointed out an ISDA rule would address dairy waste issues, but would not be able to enforce on air or ammonia emission issues. If that process is used, he thought the rule would have to be completely rewritten. Mr. Patten commented an ISDA rule would also be tied to the milk permit and that would probably not be well received by industry.

Martin Bauer stated any authority that is delegated by DEQ will be written up in an MOU that will outline each agencies' responsibility.

Lisa Kronberg commented the question of whether the rule should be promulgated by DEQ or ISDA could have legal issues that should probably be investigated further.

A change was approved to Section 764.01 to read, "Each dairy farm subject to Section 760 through 764 of these rules or obtaining a permit by rule shall employ BMPs . . ." The language was added to clarify that dairy farms who are not subject to the rules, but voluntarily choose to get a permit by rule, shall employ BMPs for the control of ammonia.

Lisa Kronberg questioned whether there were objections to Section 763.03.b asking for the approximate or predicted size and type of dairy farm. Ken McClure restated his objection to requesting this information because it serves no regulatory purpose. Marv Patten commented the language would have to be crafted carefully to avoid confusion for those voluntarily taking part in the program. Martin Bauer restated the matter was tabled for now.

BEST MANAGEMENT PRACTICES STATUS UPDATE

Ron Sheffield, University of Idaho, distributed an updated spreadsheet of BMPs (see attached "Ammonia Control Practices for Idaho Dairies" dated June 22, 2005). He noted the addition of items under Waste Storage and Treatment:

- Direct Utilization of Collect Slurry
- Direct Utilization of Parlor Wastewater

He explained the liquid in these systems never goes to the storage unit. It goes to a small sump, then immediately to the field.

Marv Patten discussed the need to indicate a maximum retention time before direct utilization of slurry and parlor wastewater (includes holding pen). He suggested a cutoff of two days or 48 hours. Ron Sheffield will add a maximum of two days hydraulic retention time (HRT). If the two days is exceeded, the points will not be awarded. The group agreed to the change and discussed the need to clarify whether a reduced number of points could be awarded for partial compliance with a BMP. For example, could three points be awarded for direct utilization of slurry within three days?

Ken McClure was concerned that the current list of BMPs does not offer many opportunities for an open lot dairy operation to acquire BMP points. If the threshold is set at 50 points, it is doubtful they could comply. Ron Sheffield felt this was simply a matter of a lag in research knowledge of possible BMPs.

The group discussed whether a BMP should be added to award points for siting a lagoon or waste in a location that reduces ambient impacts at the property line. Martin Bauer felt it was important to include siting as a BMP to provide incentive and an additional opportunity to gain points. While industry supported an additional opportunity to gain points, they were careful to point out the rule was not an odor rule and BMPs should not be designed in a way that makes it function like an odor rule. Mr. Bauer explained the goal of a siting BMP would be to control emissions at the property line. It may help with odors, but is directly related to emissions. Mr. Sheffield will work on drafting suggested language for siting (distance from property line) BMPs for consideration.

Mike Quesnell, Idaho Dairymen's Association, asked if monitoring data could be used as a BMP to gain points. Martin Bauer explained since there is no standard for ammonia, the monitoring data would simply be a demonstration of compliance. It would not be a BMP because it does not take action to reduce ammonia levels.

Ron Sheffield explained the BMPs are designed on an annual basis and natural changes in BMP usage based on seasonal changes are already reflected in the scoring of the points.

SCHEDULE AND AGENDA FOR FUTURE MEETINGS

The next negotiated rulemaking meeting was scheduled for August 2, 2005 from 9:00 a.m. – 12:00 p.m. at the DEQ state office in Boise. The meeting will begin with a more thorough discussion of the BMPs. Mike Quesnell asked that a separate discussion be planned for the distance BMP. The agenda will include the following items for discussion:

- BMP additions, clarifying language, and points
- BMP for distance
- Draft rule

ATTACHMENT 1

TEXT OF RULE – 6-29-05

760. RULES FOR THE CONTROL OF AMMONIA FROM DAIRY FARMS.

The purpose of Sections 760 through 764 is to set forth the requirements for the control of ammonia through best management practices (BMPs) for certain size dairy farms licensed by the Idaho State Department of Agriculture to sell raw milk for human consumption. Compliance with these sections does not relieve the owner or operator of a dairy farm from the responsibility of complying with all other federal, state and local applicable laws, regulations, and requirements, including, but not limited to, IDAPA 58.01.01.161, 650 and 651.

761. GENERAL APPLICABILITY.

The requirements of Sections 760 through 764 apply to the following size dairy farms:

SUMMARY: Animal Unit (AU) or mature cow threshold to produce 100 ton NH₃/year

Animal Unit (AU) Basis	Drylot	Free Stall/Scrape	Free Stall/Flush
	AU (100 t NH ₃) threshold		
No land app	7089	3893	2293
27% volatilization ¹	6842	3827	
80% volatilization ²	6397	3700	
Cow basis (1400 lbs)	Drylot	Free Stall/Scrape	Free Stall/Flush
	Total cows (100 t NH3) threshold		
No land app	5063	2781	1638
27% volatilization ¹	4887	2733	
80% volatilization ²	4569	2643	

¹ Assumes: Expected level of N->NH₃ volatilization for: **drop-hose or other ground level liquid manure application**

² Assumes: Expected level of N->NH₃ volatilization for: **center pivot or other conventional sprinkler irrigation liquid manure application**

[additional explanation needed?]

762. PERMIT BY RULE.

Owners and operators of dairy farms shall be deemed to have a permit by rule if they comply with all of the applicable provisions of Sections 760 through 764. Nothing in Sections 760 through 764 shall preclude any owner or operator of a dairy farm from requesting and obtaining an air quality permit pursuant to Section 200, nor shall Sections 760 through 764 preclude an owner or operator of a dairy farm below the threshold size in Section 761 from complying with Sections 760 through 764 and thereby obtaining a permit by rule.

763. REGISTRATION FOR PERMIT BY RULE.

01. Registration Process. Any owner or operator of a new dairy farm shall register within fifteen (15) days of commencing operation.

02. Any owner or operator of an existing dairy farm shall register within fifteen (15) days of the effective date of Sections 760 through 764.

03. Registration Information. The following information shall be provided by the registrant to the Department of Environmental Quality and the Department of Agriculture:

- a. Name, address and telephone number.

- b. Information sufficient to establish that the dairy farm is of the size and type subject to these rules per Section 761.
- c. Information describing what BMPs, as described in Section 764, are employed to total ____ points.
- d. Registration forms for this submittal are available at www.____.

04. Upon receipt of the registration information, the state of Idaho shall conduct a qualifying inspection to ensure the requisite point total of BMPs are employed.

764. DAIRY FARM BEST MANAGEMENT PRACTICES.

01. BMP. Each dairy farm subject to these rules shall employ BMPs for the control of ammonia to total ____ points. The following table lists available BMPs and the associated point value. As new information becomes available or upon request, the Director may determine a practice not listed in the table constitutes a BMP and assign a point value. Director approved BMPs not listed below shall be available for review in the Manual of Best Management Practices for the Control of Ammonia at Dairy Farms at www.____.